MEMORANDUM OF LAW

DATE: September 14, 1993

TO: Linda Baldwin, Equal Employment Investigative Officer, Personnel Department

FROM: City Attorney

SUBJECT: Discrimination Complaint Procedures

BACKGROUND

The recent case of EEOC v. General Motors, 61 FEP Cases 1657 (1993), indicated that the longstanding General Motors corporate policy of dismissing internal discrimination complaints if the employee files a complaint with an outside agency such as the Equal Employment Opportunity Commission ("EEOC") violates the protections of Title VII and the Age Discrimination in Employment Act ("ADEA"). The City currently employs a similar policy and dismisses internal complaints once a complaint has been filed with an outside agency. You have asked if this policy should be changed in light of the General Motors case.

ANALYSIS

Section 704(a) of Title VII provides that it is unlawful "for an employer to discriminate against any of his employees . . . because he ┌the employeeσ has made a charge . . . under this subchapter." 42 U.S.C. Section 2000e-3(a). Section 4(d) of the ADEA states that it is unlawful "for an employer to discriminate against any of his employees . . . because such individual . . . has made a charge . . . under this Act." 29 U.S.C. Section 623(d).

The ability to file an internal complaint to seek resolution of a discrimination complaint is construed as a benefit for employees. In General Motors, the court, quoting the EEOC papers, cites E.E.O.C. v. Board of Governors of State Colleges, 957 F.2d 424, 427-29 (7th Cir. 1992), in support of its assertion that General Motors may not suspend an employee benefit, such as the internal complaint procedure, in response to the employee filing a charge with the EEOC.

Specifically, the court said:

> Section 4(d) explicitly prohibits discrimination against employees who

> engage in protected activity . . . . The employer may not proffer a good faith reason for taking retaliatory action. For example, the Board's asserted justification, . . . avoiding duplicative litigation, does not rebut the claim that the Board discriminated against employees who engaged in protected activity. Rather the Board's justification alleges that non-malicious discrimination against employees ought not be legally prohibited. It is not for this court to determine when retaliation is permissible. Congress already resolved that issue . . . . Congress chose not to enact any affirmative defenses to a charge of retaliation, 29 U.S.C. Section 623(f), and did not provide an exception to Section 4(d) when such discrimination would be rational or financially prudent.
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> . . . .
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> Under Board of Governors, GM is in violation of the statutes if it discriminated against its employees for filing charges with the EEOC even if the discrimination was non-malicious or sensible, eg. to avoid an investigation by two different staffs--one for the in-house process and one for the EEOC process.

To establish a prima facie case of retaliation, an employee must allege and prove that he or she suffered an adverse employment action by the employer. Deferring or prohibiting an employee's use of an internal complaint procedure is an adverse action because it effectively strips an employee of a benefit for filing a complaint with an external agency.

CONCLUSION

The General Motors case and the Board of Governors case specifically find that an internal complaint process is an employee benefit. They further find that denial of a benefit to an employee who files an EEOC complaint is per se retaliation under the Title VII and the ADEA. Based upon the court's

holdings, we recommend Personnel Regulation K-2 be amended to reflect the courts findings.

If you have any further questions, please give me a call.

JOHN W. WITT, City Attorney
By
Sharon A. Marshall
Deputy City Attorney

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